BRIEF IN SUPPORT OF THE FOREGOING PETITION FOR CERTIORARI

The following argument is offered on the "Questions Presented" as set forth in the foregoing petition.

I.

The granting of the writ of certiorari by the District Court of Nueces County, Texas, suspended the power and jurisdiction of the County Court of Nueces County, Texas, to proceed with a general administration of Schatzel's estate, or to sell lands belonging to said estate, during the pendency of the contest over his will pending in the District Court.

The pertinent statutes are Articles 1287, 1288 and 1289 of PASCHAL'S DIGEST (Sections 27, 28, and 29 of the TEXAS PROBATE ACT OF 1848), which provide:

> Sec. 27 (Art. 1287). "Wills shall be probated, and letters testamentary or of administration, with full powers, shall be granted only in open court at a regular term thereof after application in writing, and notice, as hereinbefore required; but whenever it may appear to the Chief Justice that the interest of an estate requires the immediate appointment of an administrator, he shall either in open court or in vacation, by writing under his hand and the seal of the court, attested by the clerk, appoint some proper person administrator pro tem with such limited powers as the circumstances of the case may require. Such appointment may be made without notice—shall define the powers conferred, and before being delivered to the person appointed, shall be recorded in the minutes of the court; and the clerk shall indorse thereon a certificate that it has been so recorded; and until such record and certificate are made, the appointment shall not take effect. Such appointment shall cease to be of force on the first day of the term of the court

next after the date thereof, unless continued in force by an order entered on the minutes in open court; and in no case shall such appointment continue in force beyond the first day of the second term of the court after the date thereof."

Sec. 28 (Art. 1288). "Pending any contest relative to the probate of a will, or the granting of letters of administration, whether such contest be in the County Court, or in any other court on appeal, it shall be the duty of the chief justice to appoint an administrator pro tem in the manner prescribed in the preceding section, and with such limited powers as the circumstances of the case may require. Such appointment may continue in force until the termination of the contest, and the appointment of an executor or administrator with full powers."

Section 29, (Art. 1289) provides that the administrator pro tem shall give bond, and take oath, as required of other administrators.

Two methods were provided by the statutes of Texas for removal of proceedings in probate matters from the County Court to the District Court,—by direct appeal, and by certiorari. The Act of 1848, Art. 480, PASCHAL'S DIGEST, pertaining to the grant of the writ of certiorari, provides:

"Any person interested, desiring to have the proceedings of the County Court pertaining to the estates of decedents and wards, revised and corrected, may do so, by application to the judge of the District Court, and the judge of the District Court shall, upon such application being made, grant a writ of certiorari, to remove the proceedings to the District Court, there to be revised and corrected. And such certiorari shall not operate as a supersedeas, unless such applicant shall give a bond with good and sufficient sureties, payable to the chief justice of the County Court, in the same manner as in cases of appeal."

Art. 471 of PASCHAL'S DIGEST provides that the trial in the

District Court shall be de novo. From an early date, the Supreme Court of Texas has consistently held that the remedy of appeal by certiorari is concurrent with that of direct appeal, and that a case removed to the District Court by either must be tried de novo. (CHRISMAN v. NEWSOM, 9 Tex. 113; MOORE v. HARDISON, 10 Tex. 467; RAY v. PARSONS, 14 Tex. 370; WHITE DENTAL MFG. CO. v. HERTZBERG, 92 Tex. 528, 50 S.W. 122; HALL v. CLAIBORNE, 27 Tex. 222.) Judgment of the District Court in such cases are certified to the County Court to be carried into effect. (PASCHAL'S DIGEST, Art. 1460.)

The County Court of Nueces County, Texas, entered judgment January 5, 1856, probating the will of said Schatzel (Tr. 487). His heirs, contestants of the application to probate the will, filed their petition for writ of certiorari (Tr. 416) praying the removal of said proceeding to the District Court for revision, etc. On which the District Judge of Nueces County issued an order "to the Chief Justice of the County Court of said County of Nueces and to the Clerk thereof, requiring them to send up to the next term of the District Court of said County, all the proceedings had in said cause, that the same may be enquired into and justice done in the premises" (Tr. 422). This was done, April 1, 1856 (Tr. 425), and the case was thus removed to the District Court; contestants filing supersedeas bond (Tr. 423).

Thereupon, and in accordance with the provisions of Section 28, supra, the County Court of Nueces County entered the following order in said Schatzel's estate:

> "The petition of Samuel W. Fullerton showing that the decree establishing the will of John P. Schatzel, deceased, having been superseded by certiorari from the District Court of Nueces County, and praying that he be appointed administrator pro tempore of the estate of said Schatzell, deceased, during the pendency of the controversy of this cause, having been presented, it is con-

> sidered, ordered, adjudged and decreed by the Court after hearing the case and examining the law and evidence in relation to the matter, that Samuel W. Fullerton be and is hereby named and appointed administrator pro tempore of the aforesaid estate of John P. Schatzell, deceased, during the pendency of the controversy in this case, whose duty it shall be to gather and take into possession all the assets, demands and evidences of debt or title belonging to said estate, with full power and authority to do and perform all legal acts and take such proceedings as shall or may be necessary to maintain him in the possession and charge of said estate and property, real and personal, so as to preserve the same and prevent its removal or waste, until the further order and decree of this Court." (Tr. 502.)

From that time forward said Fullerton acted as administrator pro tem by virtue of the foregoing order and his qualification thereunder.

The decisions of the Texas Supreme, and Appellate Courts, is consistent from the earliest times, that the appeal suspends all proceedings in the county court, until the case is decided by the District Court. The following decisions are cited:

STONE v. SPILLMAN, Tex. Sup., Vol. 16, p. 432, the Court held: "We believe that if the answer be true (and it must be regarded to be true), a meritorious defense was offered; that the appeal suspended all proceedings until it was decided. The giving bond and security suspended all action until the appeal was tried and decided."

STONE v. BROWN, 16th Tex. Reports, at p. 431, the Supreme Court of Texas held:

> "We believe that the appeal in this case brings before us for revision the whole action of the probate court in relation to the will of the deceased, and the refusal to grant letters testamentary to the petitioner, and the grant of administration to the objectors."

WIREN v. NESBIT, 85 Tex. 286, 20 S.W. 128, the Texas Supreme Court said:

> "The appeal required the case to be tried de novo in the District Court. During the appeal the creditors could not sue on the bond any more than pending the action of the probate court on the account."

STEWART v. MOORE, 291 S.W. 891, the Supreme Court held:

> "It is apparent from the record in this case that the plaintiff in error filed appeal bond duly approved within the time prescribed by law. This admitted fact divested the county court of Tarrant County of all jurisdiction over the case. When the County Court was thus deprived of the jurisdiction eo instanti the District Court was invested with jurisdiction over the case."

EARL v. MUNDY, 227 S.W. at p. 724, writ of error denied, the Texas Court of Civil Appeals holds that "An appeal from the order probating the will required a trial de novo and suspends the final judgment, leaving the estate unsettled pending the appeal."

QUIROZ v. CANTU, 119 S.W. (2d), p. 568, writ of error denied, the Texas Court of Civil Appeals holds that

> "The appeal from the County Court to the District Court in the proceeding to probate the will had the legal effect to supersede the probating of the will and the appointment and qualification of the executor named thereunder."

II.

While the contest over the probating of the will of Schatzel was pending on appeal in the District Court, the County Court of Nueces county was without power to order its temporary administrator to sell the lands

of said estate, and such sale by the temporary administrator was void and passed no title.

Sections 27 and 28, of the PROBATE ACT OF 1848, do not admit of the construction placed thereon by the Circuit Court of Appeals. The striking contrast between the "full powers" of a permanent administrator, and the "limited" powers of an administrator pro tem. leaves no room for doubt. There would be no practical distinction between the two, if the construction of the Circuit Court of Appeals were correct. That such construction is directly in conflict with the local law of Texas, is clearly established by the decisions of the appellate courts of Texas. The very concept of temporary administrator suggests a suspension of regular administration proceedings until the estate is ready for permanent administration. Section 28 of said Act provides that the administrator pro tem. shall continue to act "until the termination of the contest and the appointment of an executor or administrator with full powers." If the County Court had the power, through means of a temporary administrator, to proceed to the extent held by the Circuit Court of Appeals, Section 28 of said Act becomes meaningless, and empty noise. The Legislature of Texas should not be convicted of not knowing the difference between the everyday words "full" and "limited."

Shortly after the Act of 1848 became law, this question was presented to the Supreme Court of Texas for decision, in the case of ALEXANDER v. BARFIELD (1850), 6 Tex. p. 400, in which the order appointing the temporary administrator empowered him "to transact all business as administrator of said estate until one may be appointed in our Court of Law." The Supreme Court, after quoting the provisions of Section 27 of said probate act, said:

"It will be seen, by comparing the evidence of the

> appointment of C. H. Alexander as recited, with the article cited from the Digest, under which it is assumed they were issued by the chief justice, that the requisitions of the law have not been regarded in scarcely a single essential particular. Instead of giving the limited powers for the particular occasion, they gave general and full powers, without any reference to being made a party to the suit, which was the only ground on which, in this case, the chief justice had any authority to act. The court below could not regard the pro tem. appointment of administrator as of any validity, and could only treat the same as a nullity."

The power to determine, allow, classify, and pay the debts of the estate, and to sell land of the estate for that purpose has never been recognized by the appellate courts of Texas as among the "limited powers" conferred by law upon a temporary or special administrator. Such appointment is not by order or judgment of the county court, but is made by the county judge (chief justice), in his capacity as such official; it may be made in vacation or in term time, without notice, delay, hearing, or opportunity for contest—is merely the ministerial act of that official. It has always been the universal ruling of the Texas appellate courts that his powers are limited to such as are expressly given in the order of appointment. (R. C. S., Art. 3379.) Thus, in DULL v. DRAKE, 68 Tex. 205, 4 S.W. 364, the Supreme Court says:

> "Our probate law does not contemplate that a temporary administrator shall have any powers except such as are expressly granted him by the County Judge at the date of his appointment. * * * The principal object of the temporary appointment is to preserve and keep the estate together until it can pass into the hands of a person fully authorized to administer it for the benefit of creditors and heirs."

The issue in DULL v. DRAKE was whether a sale of land

made by a temporary administrator under order of the county court, which was reported and confirmed by said court, was valid and passed title. The Supreme Court held the sale was void and that no title passed thereby. It is directly in point and completely supports our contention.

The application for the sale of the land in question was made by Fullerton, in his capacity of administrator pro tem. of Schatzel's estate (Tr. 518). On November 2nd, 1859, H. A. Gilpin, Chief Justice of Nueces County, made an order directing said Fullerton, as administrator pro tem. of said estate, to sell the land (Tr. 519). On February 21, 1860, said Fullerton, as administrator pro tem. of said estate, filed his report of sale of the land in this suit to Robert Mott (Tr. 521). The order confirming the sale recites that such sale was made by said Fullerton in his capacity as administrator pro tem. of said estate, and directs him, as administrator pro tem. of said estate, to execute a deed to Mott for said land. All of said orders and report recite on their face that said Fullerton was acting as administrator pro tem. of said estate. The deed executed by Fullerton to Mott shows on its face that said Fullerton acts in capacity of administrator pro tem. of said estate, and contains a verbatim copy of the order confirming the sale, which recites that he is administrator pro tem. of said estate (Tr. 526). The entire proceeding carries on its face patent proof of its invalidity. The Supreme Court of Texas, in the case of STAFFORD v. HARRIS, 82 Texas 184, 17 S.W. 530, on such a record, says:

> "While the county court, in the administration of estates, is a court of general jurisdiction, and, having jurisdiction of the subject-matter, every presumption is indulged in favor of the rightful exercise of its jurisdiction, still, when an order shows on its face the entire want of jurisdiction to make the same, it must be held invalid, and may be impeached in a collateral proceeding. The report of sale was of the sale of the land as made by

> a person who was unauthorized to make it. It was of a void sale. The order of confirmation undertakes to confirm a sale which appears from the order itself to be a void sale. A purchaser looking to the order of confirmation would be informed that it was made by a person who was unauthorized by law to make it, consequently of its nullity."

Other Texas decisions apply the same principle. In CRIER v. COWDEN, 251 S.W. 822, writ of error denied by the Supreme Court, a guardian had exchanged lands of his wards after authority to do so had been granted by the probate court, and subsequently the exchange was approved by the court. There was no statute in force authorizing the exchange of a ward's land. After reaching their majority the wards sued to cancel the guardian's deed and recover the lands. In affirming judgment for the wards, the Court of Civil Appeals of Texas said:

> "The deed sought to be cancelled is void because the application of the guardian, the order of the court, and the approval order, as well as the deed, show that the probate court had not the power to authorize the guardian to exchange the lands of the wards. Therefore, the orders were subject to collateral attack. Withers v. Patterson, 27 Tex. 491, 80 Am. Dec. 643; Marks v. Hill, Admr., 46 Tex. 345; Trammel v. Philleo, 33 Tex. 395. The guardian is nowhere authorized to exchange the lands of the wards by any statute, so the probate court acted in excess of its jurisdiction. Freeman on Judgments, Sec. 119; Crow v. Van Ness, 232 S.W. 539."

The Court held in MARKS v. HILL, 46 Tex. p. 351, that

> "The County Court had no authority to dispose of the property of an estate, except as it was conferred upon it by statute."

The Circuit Court of Appeals, in this case, takes the opposite

view, and cites, as authority: CASSEDAY v. NORRIS, 49 Tex. 613; CALLAHAN v. HOUSTON, 78 Tex. 494, 14 S.W. 1027; WILKIN v. SIMMONS, 151 S.W. 1145. CASSEDAY v. NORRIS was a sale made during a regular permanent administration, and may be dismissed as not bearing on the question. What the court actually held in CALLAHAN v. HOUSTON, supra, was that the county court could invest the temporary administrator with "such power as is temporarily necessary for the preservation of the estate." No sale of land was involved in that case; the issue being whether the court had power to authorize a temporary administrator to prosecute a suit on behalf of the estate. WILKIN v. SIMMONS, involved a sale made in the course of general administration of the estate, and is of no value on the question here.

A sale of land made by a temporary administrator, under order of the county court, was held to be void in the case of CREWS v. O'GWYN, 106 S.W. 757, by the Court of Civil Appeals, and writ of error denied by the Supreme Court of Texas, in which the court said: "The power to sell land has not been given to him by law." Citing DULL v. DRAKE, 68 Tex. 205, 4 S.W. 364; WILLIS v. PINKARD, 21 Tex. Civ. App. 423, 52 S.W. 626.

The Supreme Court, in FRANCIS v. NORTHCOTE, 6 Tex. 187, decided in 1851, held:

> "The jurisdiction of the County Court as a court of probate is conferred under the 15th Section of Article IV of the Constitution, which constitutes it an 'inferior tribunal' with a jurisdiction limited to certain enumerated subjects. These are: 'The appointing of guardians, granting of letters testamentary and of administration, settling the accounts of executors, administrators, and guardians, and the transaction of business appertaining to estates.'
>
> "Being a court whose powers are defined and limited by express law, its authority is restricted to the enume-

> rated subjects. It cannot transcend the powers conferred by the constitution and laws enacted in pursuance of it."

The Circuit Court of Appeals holds the County Court of Nueces County having acquired jurisdiction of the estate, had power to increase the powers of the temporary administrator beyond the "limited powers" required by the terms of Section 28, and by some legerdemain convert him into a general administrator with full powers. The Court overlooks the fact that the jurisdiction of the County "Court" over the estate had been ousted by the removal of said matter by certiorari to the District Court. Jurisdiction could not be in the two courts at the same time, or be split between the two. The Legislature recognized this when it provided in Section 27 that administrators with full powers should be appointed only "in open court at a regular term thereof,—and Section 28, that pending any will contest, whether in the County Court or in any other court on appeal, "it shall be the duty of the Chief Justice to appoint an administrator pro tem," with limited powers, etc. In Texas there is well defined distinction between a "judge" and a "court." In PITTMAN v. BYARS, 100 Tex. 518, 101 S.W. 789, the Supreme Court said:

> "Though a judge of the District Court may decide certain matters in vacation, and render judgment therein, yet such judgment, whether interlocutory or final, is not the judgment of the court over which he presides, but is merely his judgment as a district judge sitting in vacation."

When the Probate Court goes beyond the terms of the statute, its orders are void, as held in MOYERS v. CARTER, 61 S.W. 2d series, 1031, writ of error denied by the Supreme Court. The court in that case says that

> "The Court correctly appointed a temporary administrator to collect and hold in his possession the proceeds of the insurance policy. The probate court, when it permitted the temporary administrator to go beyond this power, and thereby to dissipate the entire estate during the temporary administration, acted in violation of our probate laws, and hence the orders are void." Citing DULL v. DRAKE, CRUSE v. O'GWYN, supra.

There is no decision by the Supreme Court, or by any of the Courts of Civil Appeals of Texas, holding that the County Court has power, through temporary administration, to order sale of lands belonging to an estate, and such is not the local law of this state. The holding of the Circuit Court of Appeals is in direct conflict with the settled law of Texas, and is unsupported by decision of any of the Appellate Courts of Texas. If the decision is not reversed, it will inject into the jurisprudence of Texas a doctrine wholly incompatible with the settled law of Texas on the extent of powers of temporary administrator; therefore, the question now before this Honorable Court is one of great importance to the people of Texas, and petitioners respectfully submit that, under the ruling in ERIE RAILWAY CO. v. THOMPSON, 304 U.S. 64, 82 L. Ed. 1188, this Honorable Court should exercise its power of revision, and reverse the decision of the Honorable Circuit Court of Appeals.

III.

The judgment of the County Court of Nueces County, Texas, probating the will of Schatzel was vacated, set aside and annulled by the writ of certiorari issued by the District Court of that County, and said entire proceeding was thereby removed to the District Court for trial de novo; the burden resting on Zacharie, the proponent of said will, to prosecute the

case to judgment probating the will in the District Court. That was not done, but the case was dismissed by the District Court in 1868. Such dismissal ended the case and left the will unprobated.

An alleged lost holographic will of John P. Schatzel was, on an application filed by James W. Zacharie, admitted to probate by the County Court of Nueces County, Texas, by judgment of said court January 5, 1856; the contest to said will filed by the heirs of Schatzel being overruled (Tr. 487). The contestants filed in the District Court of Nueces County, on March 1, 1856, a petition for a writ of certiorari praying the removal of said matter to the District Court. The District Court of Nueces County granted the writ as prayed for in the petition (Tr. 422), supersedeas bond being filed and approved (Tr. 423, 426), and the writ of certiorari was issued and executed on April 1, 1856 (Tr. 427). The venue of the case was transferred from the District Court of Nueces County to the District Court of Galveston County (Tr. 506). On June 3, 1868, the following final order was made in said case by the District Court of Galveston County, Texas, viz.:

> "On this day came the parties by their attorneys and dismiss this case, and the costs are paid" (Tr. 507).

Two ways are provided by the statute law of Texas for appealing from judgments of the County Courts in probate matters—one by direct appeal, and the other by certiorari from the District Court. The remedies are concurrent, and the trial in the District Court is anew, as if originally instituted in that court. The appeal, in either mode, operates to vacate and annul the judgment appealed from. The parties occupy the same relative positions in the District Court as in the County Court; the burden resting on the proponent in the District Court as in the court aquo to prosecute the suit to

final judgment, and in event the suit is dismissed in the District Court, that is the end of the case. Such has been the law in Texas from the earliest times. (CHRISMAN v. NEWSOM, 9 Tex. 113; MOORE v. HARDISON, 10 Tex. 467; RAY v. PARSONS, 14 Tex. 370; BINGHAM v. WATERHOUSE, 32 Tex. 468.) The proponent may discontinue, or dismiss, the proceeding, in either the County Court or after it reaches the District Court; but the contestants, occupying the position of defendants, are powerless to dismiss the case. (BINGHAM v. WATERHOUSE, supra.)

The dismissal of the case in the District Court does not revive the judgment of the Probate Court. This doctrine is as old as the Courts of Texas. (MILLER v. HOLTZ, 23 Tex. 138; ROBERTS v. MCCAMANT, 70 Tex. 743, 8 S.W. 543; CAVANAUGH v. CAVANAUGH, 238 S.W. 1019, writ denied by Supreme Court; HAYDEN v. MIDDLETON, 135 S.W. 2nd series, p. 283; HARTER v. CURRY, 101 Tex. 187, 105 S.W. 988; QUIROZ v. CANTU, 119 S.W. 2nd series, p. 568, writ of error denied by the Supreme Court; CALLAGHAN v. GRENET, 66 Tex. 237, 18 S.W. 508.)

In the case of CAVANAUGH v. CAVANAUGH, the suit was pending in the District Court on appeal from a judgment of the Probate Court refusing to set aside an order probating a will. The District Court dismissed the suit. The court held that

> "The dismissal of the cause in the District Court did not revive the judgment of the County Court from which the appeal was taken, but put all parties out of court."

In the case at bar, the District Court of the United States for the Southern District of Texas held that the will of Schatzel was validly probated by the County Court of Nueces County, and that the removal of said proceeding by

certiorari to the District Court, and the later dismissal thereof without a final judgment by the District Court probating the will, left the judgment of the County Court probating said will in full force and effect. That holding is in direct conflict with the settled law of Texas. The petitioners, in their appeal to the Circuit Court of Appeals, assigned error to that holding. The Court of Civil Appeals did not render a decision on that question, on the ground that it was unnecessary in view of their holding that the certiorari proceeding in the District Court did not oust or suspend the jurisdiction of the County Court to proceed with the administration of the estate, and that therefore the sale by the administrator pro tem passed title. In their motion for rehearing filed in the Circuit Court of Appeals, these petitioners urge said Court to consider and sustain their assignment (Tr. 771), and their motion was denied (Tr. 799). Petitioners believe that this Court should grant them a writ of certiorari herein and reverse the decision of the Circuit Court of Appeals, and of the District Court, because the rule is thoroughly settled in Texas, by repeated decisions of the Supreme Court of said state, that the removal of proceedings from the County Court to the District Court by appeal or certiorari, vacates the judgment appealed from, that the case stands for trial de novo in the District Court, and if dismissed in the latter court without a final judgment on the merits of the case, such dismissal is the end of the case, and the judgment of the County Court is not revived. The decisions of the Appellate Courts of Texas on the issue are controlling; and the decision in this case should be made to conform.

Petitioners further contend that since the District Court of the United States for the Southern District of Texas held in this case that the will of Schatzel was validly probated by the County Court, and on such holding and conclusion rendered judgment against petitioners, the refusal of the Circuit

Court of Appeals to review that decision and judgment of the District Court, will deprive petitioners of a vast quantity of land (in addition to that involved in this suit) owned by Schatzel at the time of his death, and which was not sold through administration proceedings on his estate, including a tract of 1500 acres called the Rincon, and also Mustang Island (Tr. 443 and 445);—because the judgment of the United States District Court, unless reversed, will operate as an estoppel against petitioners in any suit to which they are parties, involving said other lands, and will prevent them from asserting their title thereto. (HOUSTON TERMINAL LAND COMPANY v. WESTERGREN,—Texas Supreme Court, Vol. 27 S.W. (2d), p. 526; HARRISON v. BANK, 224 S.W. 273; OKLAHOMA v. TEXAS, 256 S.W. 70, 41 Sup. Ct. 420, 65 L. Ed. 831.) And the result will be that petitioners will be deprived of their property without a day in court. (SAUNDERS v. SHAW, 244 U.S. 317, 61 L. Ed. 1163, 37 Sup. Ct. 638; HELIS v. WARD, 308 U.S. 365, 84 L. Ed. 327.)

IV.

All of the judgments and orders entered by, and proceedings had before Cornelius Cahill, Chief Justice and Judge of the Probate Court of Nueces County, Texas, in the matter of the estate of John P. Schatzel, deceased, were coram non judice and void, because the said Cornelius Cahill was a debtor of said estate and "interested" therein and thereby disqualified to act as judge in any proceeding incident to said estate or its administration.

On January 5, 1856, the said Cornelius Cahill entered an order as Chief Justice of Nueces County, admitting to probate the alleged will of John P. Schatzel, deceased (Tr. 487), and on February 2, 1856, he appointed said Samuel W. Fuller-

ton administrator with the will annexed of Schatzel's estate (Tr. 492); said Fullerton promptly filed his oath and bond, which was approved by said Cahill (Tr. 494, 5); inventory, appraisement and list of claims was filed by said Fullerton (Tr. 497) showing among the assets of said estate "C. Cahill's note, June 4, 1854, $600.00" (Tr. 499). On April 28, 1856 (Tr. 501), said Samuel W. Fullerton filed his petition stating that the decree establishing the will of said Schatzel had been superseded by a writ of certiorari granted by the District Court; he prayed to be appointed administrator pro tem of the estate of said Schatzel during the pendency of said contest, and on the same day Cornelius Cahill entered an order appointing said Fullerton administrator pro tem of Schatzel's estate during the pendency of said will contest (Tr. 502, 3); and said Fullerton having filed bond, which was approved by said Cahill (Tr. p. 503), the said Cahill, Chief Justice, issued to said Fullerton letters of administration pro tem on said estate as prayed for (Tr. 504). From that time forward Samuel W. Fullerton acted as administrator pro tem solely by virtue of that order and his qualification thereunder.

From the date of death of John P. Schatzel on October 23, 1854, up to and including May 27, 1856, all orders, judgments and decrees relating to his estate were entered by Cornelius Cahill, who was then the judge of the Probate Court of Nueces County; and all proceedings in the estate were had before said Cahill.

The said Cornelius Cahill was a debtor of the Schatzel estate during all such period, as affirmatively and conclusively appears from matters of record in said estate. The first inventory made in the estate dated October 28, 1854 (Tr. 447), listed as an asset of said estate "C. Cahill's note dated June 4, 1854, $600.00," and in subsequent inventories (Tr. 499). On September 24, 1858, after Cahill had ceased to be Chief

Justice, suit against him was filed in the District Court of Nueces County and judgment against him was rendered on said note on December 16, 1858 (Tr. 428, 432).

Section 14 of Article IV of the CONSTITUTION OF TEXAS OF 1845, which was in force at the time, provided:

> "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity within such degrees as may be prescribed by law, or where he shall have been of counsel in the cause. * * * The disqualifications of judges of inferior tribunals, shall be remedied as may hereafter be by law prescribed."

Section 15 of said Art. IV, reads:

> "Inferior tribunals shall be established in each county for appointing guardians, granting letters testamentary and of administration, for settling the accounts of executors, administrators, and guardians, and for the transaction of business appertaining to estates." * * *

The Legislature of Texas, by Act of May 11, 1846, being Article 1406 of PASCHAL'S DIGEST, is as follows:

> "The District Courts shall have and exercise appellate jurisdiction, and general control over such inferior tribunals as have been or may be established in each county, for appointing guardians, granting letters testamentary, and of administration, for settling the accounts of executors, administrators, and guardians, and for the transaction of business appertaining to estates; and original jurisdiction in probate matters, only in cases where the judge or clerk of probate is interested."

The Act of the Legislature of Texas of December 29, 1849 (Art. 1228, PASCHAL'S DIGEST; 3 GAMMEL'S LAWS OF TEXAS, p. 21), providing an additional remedy in case of disqualification, reads:

> "Whenever the office of chief justice of any county in this state is vacant, or whenever the chief justice of any county court in this state shall be absent from the county, or unable to discharge the duties of his office, or shall be disqualified from attending to the duties of his office, by reason of interest, or from any other cause, then any two of the county commissioners of such county shall have power to do and perform all the duties of chief justice of the county court."

It is the settled law of Texas that if the judge of the Probate Court is a creditor of an estate administered by his court, he is disqualified to act therein, and all judgments and orders entered by and proceedings had before him are coram non judice and void. (BURKS v. BENNETT, 62 Tex. 277; CITY OF EL PASO v. FT. DEARBORN NAT'L BANK, 71 S.W. 799; FRIEBURG v. ISBELL, 25 S.W. 988; MOODY v. LOOSCAN, 44 S.W. 621, writ of error refused by Supreme Court.) It is also the general law that if the judge of a probate court is a debtor of an estate administered by his court, he is disqualified therein to the same extent as if he was a creditor of the estate. (GAY v. MINOT, 3 Cush. (Mass.) 352, cited with approval in NEWCOME v. LIGHT, 58 Tex. 141, 44 Am. Reports 604; STATE EX REL COCHRUN v. GRAHAM, 144 Oregon 705, 26 Pac. (2d), p. 46; 33 C. J. 997; CROOK v. NEWBERG, 27 SOUTHERN, p. 432.) The effect of Cahill's disqualification is not left in doubt by the decisions of the courts of Texas. A singular concurrence of opinion denounces every act of a disqualified judge as coram non judice and void. (TEMPLETON v. GIDDINGS, Tex. Supreme, 12 S.W. 851, judgment rendered by district judge on note collaterally assigned by firm of which he was a member. BURKS v. BENNETT, 62 Tex. 277, orders entered in administration proceedings by judge who held claims against the estate. NEWCOME v. LIGHT, 58 Tex. 141, 44 Am. Rep. 604, judgment for divorce in case wherein

judge had been consulted by one of the parties before he bebecame a judge.)

Disqualification may be proved by evidence dehors the record, on collateral attack (WEIL v. LEWIS, 2 S.W. (2d) 566; NONA MILLS COMPANY v. WINGATE, 113 S.W. 182, writ of error refused by Supreme Court.)

The Circuit Court of Appeals in this case held that the debtor relationship of Cahill, county judge, did not disqualify him from acting in the case,—and in support of that holding cited: CITY OF OAKCLIFF v. STATE, 97 Tex. 391, 79 S.W. 1068, in which the judge was interested as a possible taxpayer in a public enterprise, an interest only in common with all other taxpayers of the municipality party, and the other decisions cited by the said Court fall in the same category,—an interest wholly unlike that of debtor probate Judge Cahill, which was a direct personal obligation to the estate he was administering; and by his official position he "gained" several years' forbearance, even before he was sued for the debt. The record does not show that he ever paid the debt.

In GAY v. MINOT, supra, the Court, through CHIEF JUSTICE SHAW, said:

> "In the present case, the relation of the Judge to the deceased was that of a debtor and not a creditor. But the court are of the opinion that this relation created an interest of like kind with that of being a creditor, and under the statute, divested the judge of his jurisdiction."

Under the authorities, every act of the probate judge, Cornelius Cahill, relating to the estate of John P. Schatzel, deceased, was coram non judice and void. No legal effect can attach to any of his acts. No valid administration, therefore, was ever opened on the estate of Schatzel. The alleged will of Schatzel was never validly probated, and the heirs of James

W. Zacharie, the devisee in said will, have no right or title to the land in controversy. A judgment rendered by a disqualified judge is a nullity and leaves the case "remaining undisposed of as completely as if the judge had not been present at court." CHAMBERS v. HODGES, 23 Tex. 104; NEWCOME v. LIGHT, 58 Tex. 141, 44 Am. Rep. 604; WEIL v. LEWIS, 2 S.W. (2d), p. 566. Subsequent to May 26, 1856,—the date Cahill went out of office—the estate of Schatzel stood unaffected by any prior proceedings therein. Fullerton, having been appointed administrator by a disqualified judge, was not authorized to act as such, and his subsequent sale of the land was void. (ROSE v. NEWMAN, 26 Tex. 131, 80 Am. Dec. 646; STAFFORD v. HARRIS, 82 Tex. 184, 17 S.W. 530; KELSEY v. TRISLER, 74 S.W. 640.) It is only through an administrator, regularly appointed and qualified, that a probate court can sell lands of an estate. On this point the Supreme Court in ROSE v. NEWMAN, supra, says:

> "However plenary the powers of the county court may be upon the subject of a partition of a deceased person's estate, when a sale of property becomes necessary to carry out the partition, the administrator must sell and execute his deed, to divest the estate of title."

The decision of the Circuit Court of Appeals on the proposition above discussed, is undoubtedly unsupported by, and is in direct conflict, with the decisions of the Supreme and Appellate Courts of Texas, and calls for revision by this Honorable Court.

Conclusion

WHEREFORE, petitioners respectfully submit that their petition for certiorari should be granted, and that upon consid-

eration of the case the decision of the Circuit Court of Appeals and of the District Court should be reversed, and judgment rendered in favor of these petitioners.

Respectfully submitted,

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